Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1303, 87-1310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

---

JOINT REPLY BRIEF FOR PETITIONERS

WILLIAM JAMES MURPHY *
ROBERT T. SHAFFER, III
MURPHY & MCDANIEL
118 West Mulberry St.
Baltimore, MD 21201
(301) 685-3810
Counsel for Petitioner in No. 87-1303

E. BARRETT PRETTYMAN, JR. *
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5685
Counsel for Petitioners in No. 87-1310

* Counsel of Record

(Additional Counsel on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ERNEST V. MORTON, JR.
210 Back Fork St.
Webster Springs, WV 26288
(304) 847-5256
Of Counsel for Allegheny Pittsburgh Coal Company

WILLIAM D. PELTZ
900 Louisiana St.
P.O. Box 2463
Houston, Texas 77252
(713) 241-2414

DAN O. CALLAGHAN
CALLAGHAN & RUCKMAN
48 East Main St.
Richwood, WV 26261
(304) 846-2561
Of Counsel for East Kentucky Energy Corporation

W. T. WEBER, JR.
208 Main Ave.
Weston, WV 26452
(304) 269-2228
Of Counsel for Oneida Coal Company, Inc. and Shamrock Coal Company, Inc.

TABLE OF CONTENTS

	Page
A. Petitioners' Property Is Comparable To Surrounding Properties Assessed At Much Lower Levels	2
B. The Assessor Did Not Increase the Assessments of Other Unsold Properties in the Manner Claimed by the County	6
C. Consideration of Petitioners' Property as a Whole or Parcel-by-Parcel Does Not Alter the Record of Patently Unconstitutional Discrimination	8
D. The Discrimination Shown on the Record Cannot Be Justified	14
E. The Remedy	17

TABLE OF AUTHORITIES

Cases Page

Allied Stores of Ohio v. *Bowers*, 358 U.S. 522 (1959) 16
Bell v. *Wolfish*, 441 U.S. 520 (1979) 15
Chicago Great Western Ry. v. *Kendall*, 266 U.S. 94 (1924) 14
Cumberland Coal Co. v. *Board of Revision*, 284 U.S. 23 (1931) 14, 17
Heckler v. *Mathews*, 465 U.S. 728 (1984) 18
Hillsborough v. *Cromwell*, 326 U.S. 620 (1946) 17
Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 (1931) 17
Jenkins v. *Anderson*, 447 U.S. 231 (1980) 9
Knetsch v. *United States*, 364 U.S. 361 (1960) 15
Schlesinger v. *Wisconsin*, 270 U.S. 230 (1926) 16
Sioux City Bridge v. *Dakota County*, 260 U.S. 441 (1923) 17-18
Stanley v. *Illinois*, 405 U.S. 645 (1972) 16
Tug Valley Recovery Center, Inc. v. *Mingo Cty. Comm.*, 261 S.E.2d 165 (W. Va. 1979) 17
United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 15
United States v. *New York Telephone Co.*, 326 U.S. 638 (1946) 9
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979) 9

Other Authority

I.R. Vesselo, *How to Read Statistics* (1962) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 87-1303, 87-1310

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION,
ONEIDA COAL COMPANY, INC., and
SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

---

JOINT REPLY BRIEF FOR PETITIONERS [1]

Respondent the County Commission of Webster County ("the County") begins its brief with factual allegations that run directly contrary to facts to which the County itself *stipulated*, and which were found by the trial court to be fully supported on the record. The County then perversely contends that petitioners failed to prove the very facts to which the County had stipulated.

---

[1] Pursuant to S. Ct. Rule 28.1, petitioners note that there have been no changes in their prior listings of parents, subsidiaries, and affiliates. *See* Pet. Br. ii.

Moreover, the County does not identify a single legitimate state interest supposedly advanced by the dramatic disparities in assessment of comparable properties shown on this record and the deliberately adopted policy that caused them. Indeed, it is not until page 29 of its brief that the County refers to legitimate public purposes at all, arguing there that "[t]he distinctions created by West Virginia's taxation legislation are rationally related" to raising revenue—a fact which, whether or not true, is wholly beside the point.

Petitioners have no quarrel with West Virginia constitutional or statutory provisions governing real property taxation, because these provisions do not embrace the "welcome stranger" doctrine but instead mandate assessment of all property on the basis of "true and actual value." Petitioners' property was assessed on that basis. The problem—and what this case is about—is that what the County stipulated to be "neighboring, comparable properties" in Webster County [2] are *not* assessed on that basis, but at dramatically lower levels. This discrimination—this failure to treat those similarly situated in a similar manner—is the direct result of the Assessor's deliberate decision to rely on market prices to assess property subject to recent sale while, as the Assessor herself testified, other properties "are just carried on the books at what they have been in the past." [3]

A. Petitioners' Property Is Comparable To Surrounding Properties Assessed At Much Lower Levels

The basic thrust of the County's argument before this Court is that petitioners' property and the neighboring parcels to which it was compared are not comparable, that the disparities in assessment of from 32-to-1 to

---

[2] R. 1320: Stipulation (Feb. 10, 1984), ¶ 8; R. 1086: Stipulation (Feb. 15, 1984), ¶ 12.

[3] R. 2555: Tr. of Feb. 15, 1982, at 9 (Webster County Assessor Winefrede Skidmore).

35-to-1 for the Allegheny Pittsburgh-East Kentucky Energy property and from 8-to-1 to 20-to-1 for the Oneida-Shamrock property were based on "actual differences between petitioner's property and surrounding property." Resp. Br. i. The County *stipulated* to the opposite below; the County Assessor testified that the disparities in assessment were *not* based on any distinguishing characteristics of petitioners' property; the Circuit Court expressly found that petitioners' property and the neighboring parcels were in fact comparable; and the record abundantly supports that factual finding. It is far too late for the County to attempt to retry the facts before this Court.

1. *The stipulations.* On February 10, 1984, and February 15, 1984, counsel for the County and counsel for East Kentucky Energy and Allegheny Pittsburgh signed and filed stipulations with respect to petitioners' actions. The stipulations were formally accepted by the County Commission, and in fact entered as part of the Commission's orders in this case.[4] Each stipulation specified that "[t]he properties surrounding the property owned by your Petitioner, located on Exhibit A and listed on Exhibit B *are comparable properties* in that they are *substantially the same geologically* as the properties of the petitioner, the subject matter of this action."[5] Each stipulation also referred to the properties on Exhibit B as the "neighboring, comparable properties."[6] The dramatic disparities in assessment established on this rec-

---

[4] The stipulations may be found in the Record before this Court at R. 1083-88, 1318-22. They were admitted by the County Commission at R. 1081-82, 1454-55.

[5] R. 1319-20: Stipulation (Feb. 10, 1984), ¶ 6 (emphasis supplied); R. 1085: Stipulation (Feb. 15, 1984), ¶ 10 (emphasis supplied).

[6] R. 1320: Stipulation (Feb. 10, 1984), ¶ 8; R. 1086: Stipulation (Feb. 15, 1984), ¶ 12.

ord are based, in part, on comparison of the Exhibit B properties with petitioners' property. The stipulations establish that this is a valid comparison, and the County distorts the record in now arguing the contrary.

2. *The Assessor's testimony.* The County argues before this Court that the assessment of petitioners' property at levels many times that of the neighboring parcels "was merely a reflection of the uniqueness of petitioner's property when compared to surrounding properties." Resp. Br. 9. But that is not what the County Assessor swore to below: "Upon examination, the assessor did not contend that petitioners' assessment was the result of unique or valuable features peculiar only to petitioners' land." Pet. App. 30a; EKE Pet. App. 59a. Of course, even if the Assessor had viewed the properties, she would not have found any uniqueness explaining the disparities in assessment—the properties were, after all, stipulated to be "comparable" and "substantially the same geologically." But the Assessor admitted that she in fact "did not compare the various features of the real estate to which the high assessment was applied with the various features of land assessed at a much lower rate." Pet. App. 29a; EKE Pet. App. 59a.

3. *Factual findings below.* The trial court, after meticulously considering the voluminous record, specifically found that petitioners' property and the parcels assessed at a much lower level were in fact comparable. The court found that "petitioners' real estate is substantially similar to the real estate of the others in topography, location, access, development, mineral content and forestation, and that the petitioners' real estate is substantially similar to adjacent and contiguous tracts and parcels of real estate owned by others." Pet. App. 16a; EKE Pet. App. 50a. The court noted that:

> In addition to Exhibits B, C and G the parties stipulated and agreed to the admission of Exhibit A,

> a map showing the real estate of the petitioners and that used as comparables in Exhibits B and G. From Exhibit A it is obvious that the real estate of the petitioners and that of contiguous, adjoining and adjacent landholders to which it is compared is substantially the same. [Pet. App. 29a.]

As to the alleged hidden value of petitioners' property, the court specifically found that:

> The questioned assessments were not based upon the presence of economically minable or removable coal, oil, gas or harvestable timber in or upon petitioners' real estate, as compared to an absence of the same in or upon the [comparable] properties.
>
> The questioned assessments were not based upon present use or immediately foreseeable economic development of petitioners' real estate. The assessor did not consider the size, shape, locations, access, or availability of public highways, sewers, water, gas or electricity in assessing either the petitioners' real estate or the * * * comparables. [Pet. App. 29a; EKE Pet. App. 59a.]

These detailed findings establish comparability beyond doubt, confirming what the County had already stipulated. In particular, they establish that the disparate assessments "were not based upon the presence of economically minable or removable coal * * *." The findings also clearly refute the suggestion of amici National Association of Counties, *et al.* (a suggestion not endorsed by the County) that the properties may be somehow distinguishable even if geologically the same. *See* Nat'l Ass'n Br. 18-19.[7]

---

[7] The West Virginia Supreme Court of Appeals in no way disagreed with the stipulation or findings on comparability, referring to petitioners' concern "with the undervaluation of comparable Webster County properties" and discussing petitioners' "evidence of the assessed value of comparable properties." Pet. App. 5a.

The trial court's findings on comparability were fully supported by evidence in the record, including maps, testimony, and valuation studies.[8] The County now argues that the alleged presence of 32 million tons of coal on the Allegheny Pittsburgh-East Kentucky Energy property explains the difference in assessments. But the Assessor herself flatly contradicted this by testifying that she took no such factors into consideration in setting the assessments. *See* Pet. App. 29a, 30a; EKE Pet. App. 59a. In any event, the record confirms that the properties are "substantially the same geologically,"[9] as the County stipulated and as the expert witness Mullenex testified.[10]

B. The Assessor Did Not Increase the Assessments of Other Unsold Properties in the Manner Claimed by the County

At several points in its brief, the County relies upon the alleged fact that the Assessor raised the assessed values of properties not subject to sale by 10 percent in

---

[8] The County claims inadequate evidence of comparability. *See* Resp. Br. 6. The County's lawyers surely cannot be permitted to stipulate to comparability below and then turn around before this Court and claim that petitioners have not adduced adequate evidence on that score. The County attempts to reconcile its inconsistency by simply ignoring the stipulations—they are not even mentioned in the County's brief.

[9] R. 1319-20: Stipulation (Feb. 10, 1984), ¶ 6; R. 1085: Stipulation (Feb. 15, 1984), ¶ 10.

[10] *See* Resp. Opp. Cert. App. 10a, 19a, 25a. Contrary to the County's suggestion, Mullenex concluded—on the basis of actual coal borings of certain properties listed among the Exhibit B comparables—that those properties generally contained "the same seams" and "mineable seams, very much the same mineable seams that occur on the Eastern Kentucky Energy property." *Id.* at 10a, 19a. There has been no mining of the East Kentucky Energy property.

The County's reliance on coal on the Allegheny Pittsburgh-East Kentucky Energy property is wholly irrelevant in explaining the disparity in assessment of the Oneida-Shamrock property.

1976, 10 percent in 1981, and 10 percent in 1983. *See* Resp. Br. 3, 13, 15. Indeed, the County goes so far as to claim that petitioners do not dispute this assertion. Resp. Br. 3. In fact, however, petitioners not only disputed the claim—as the court below expressly recognized, *see* Pet. App. 6a—they refuted it.[11] The record unambiguously demonstrates that the Assessor did not raise the assessed values of comparable unsold property in the manner claimed by the County. The Circuit Court expressly found that such increases that did take place were so insignificant that, if they were continued, it would take well over *500 years* for the assessment of the unsold comparables to catch up with the assessment of the Allegheny Pittsburgh-East Kentucky Energy property. Pet. App. 28a; *see* EKE Pet. App. 58a.

A study of the change in the assessed value of all coal tracts in Webster County from 1983 to 1984 was introduced in evidence, demonstrating that there was certainly no across-the-board 10 percent increase, as claimed by the County. The study—which was not contested by the County—showed that only 5 percent of the tracts were increased 10 percent, 18 percent were increased less than 9 percent, and fully 35 percent were unchanged. A large number of tracts received a flat $10 increase, not a 10 percent increase. EKE Pet. App. 56a.[12]

---

[11] There is no excuse for the County's misstatement to this Court that this point was not disputed. The issue was hotly contested before the trial court, *see* Pet. App. 27a-28a; EKE Pet. App. 56a, and before the Supreme Court of Appeals. *See* Pet. App. 6a. It was also disputed at the petition stage before this Court. *Compare* Resp. Opp. Cert. 13 *with* Pet. Reply Br. 3 n.2.

[12] The Exhibit B chart of comparables also demonstrates the falsity of the County's contention. For example, not one of the comparables showed a 10 percent increase in 1976. Pet. App. 22a. The Circuit Court found that "the appraised and assessed values of coal properties in Webster County have not been materially changed or revalued for the years 1981 through 1986, both inclusive." EKE Pet. App. 84a.

It is evident that the occasional and sporadic *de minimis* increases in the assessment of unsold properties in the County did little to ameliorate the dramatic disparities caused by the Assessor's adherence to the "welcome stranger" policy. The Circuit Court expressly found that from 1975-1984 the properties stipulated to be comparable to the Allegheny Pittsburgh-East Kentucky Energy property increased a scant 0.017 percent of the increase in the latter property—hardly comparable treatment. Pet. App. 28a. The increase in the assessment of the Allegheny Pittsburgh-East Kentucky Energy property over that period was, on a weighted rate per acre basis, *5,672.56 to 6,511.06 percent* in excess of the increase in the comparables on the same basis. Pet. App. 40a. Whatever steps the Assessor took with respect to unsold properties in Webster County did nothing to cure the unconstitutional discrimination established on the record.[13]

C. Consideration of Petitioners' Property as a Whole or Parcel-by-Parcel Does Not Alter the Record of Patently Unconstitutional Discrimination

The County begins its brief with a new factual argument not raised in either court below. According to the County, the startling disparities shown on the record can be explained away by treating the Allegheny Pittsburgh-East Kentucky Energy property as 19 separate parcels

---

[13] There is an unfortunate typographical error in the County's brief that may mislead the Court if not corrected. On page 15 of its brief, the County asks "whether the actions of the Webster County assessor in raising the value of property that had not been recently transferred, by *331.1 percent* was reasonable" (emphasis supplied). The County evidently meant the underscored figure to be 33.1 percent—as on page 3 of its brief—reflecting the mathematical result of the hypothesized three consecutive 10 percent increases. As noted above, the 33.1 percent figure is as fictitious as the erroneously transcribed figure, since the record establishes that in fact there were not three consecutive 10 percent increases.

rather than a single unit, and treating the Oneida-Shamrock property as 6 separate parcels rather than a single unit. Resp. Br. 1-3.[14]

The argument with respect to Oneida-Shamrock can be disposed of quickly. The County takes Oneida to task for "fail[ing] to disclose that its 'homogeneous' contiguous tract of 7783 acres consists of six tracts that have assessed values varying from a low of $50.00 per acre to a high value of $560.00 per acre." Resp. Br. 1. Oneida did not disclose this because it is not true. The only Oneida-Shamrock property at issue in this litigation consists of *two* parcels, each with precisely the *same* assessed value of $376.95 per acre.[15] The County's error is evi-

---

[14] The County did not raise this argument in either court below. Indeed, the County consistently treated the Allegheny Pittsburgh-East Kentucky Energy property as a single unit and the Oneida-Shamrock property as a single unit. *See, e.g.*, Brief of the County Commission before the West Virginia Supreme Court of Appeals, at 23, 24 ("the property was purchased for Twenty four million dollars on the open market in 1974"; "East Kentucky Energy acquired the property"; "this is a valuable piece of property"). *See also* Resp. Opp. Cert. 2. The County's new argument cannot be raised for the first time here. *See, e.g., Jenkins* v. *Anderson*, 447 U.S. 231, 234 n.1 (1980) (declining to address issue raised by respondent because "[o]rdinarily, we will not consider a claim that was not presented to the courts below"); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (prevailing party may "defend its judgment on any ground *properly raised below* whether or not that ground was relied upon, rejected, or even considered" below) (emphasis supplied); *United States* v. *New York Telephone Co.*, 326 U.S. 638, 651 n.18 (1946) ("whatever its merits," point not made by appellee until case reached this Court will not be considered).

[15] *See* EKE Pet. App. 52a (Oneida-Shamrock "at all times relevant herein, are the owners of three thousand seven hundred (3,700) acres of coal in Glade District and four thousand eighty three (4,083) acres of coal in Holly District, Webster County, West Virginia, in the aggregate seven thousand seven hundred eighty three (7,783) acres of coal"). The two parcels were jointly owned by Mr. and Mrs. Preston W. Carroll prior to sale as a package to Shamrock, and were conveyed in one deed. *See* Pet. App. 52a.

dent from its own chart on page 2 of its brief. That chart purports to list the "six tracts which comprise this 7,783 acres," listing first the 3,700 acre tract and last the 4,083 acre tract. These two tracts alone add up to the 7,783 acres. In between the County lists four tracts that have never been at issue in this litigation, and obviously do not comprise the 7,783 acres. As the County's own chart reveals, the two tracts that do comprise the 7,783 acres have precisely the *same* assessment per acre; there is *no* variation in assessment whether the Oneida-Shamrock property is considered as a whole or as two separate parcels. This is because the Assessor treated the property as a single unit and simply distributed the purchase price evenly over the 7,783 acres.

The County's new argument is no more valid with respect to the Allegheny Pittsburgh-East Kentucky Energy property.[16] The property was conveyed as a single unit from Allegheny Pittsburgh to East Kentucky Energy in 1982 in a single deed. Pet. App. 3a, 18a. Allegheny Pittsburgh had acquired the property in 1974 in three deeds from a single owner (Raymond C. Desrosier) and a fourth from Raymond and his three brothers, doing business as the Desrosier Brothers. *See* Pet. App. 18a-19a.

The County's new argument also overlooks the fact that the trial court carefully took possible distortions caused by the size of the various constituent parcels into account in conducting the pertinent comparisons. *See, e.g.*, Pet. App. 19a, 21a, 23a. Indeed, the court expressly

---

[16] The County's suggestion that Allegheny Pittsburgh and East Kentucky Energy "failed to disclose" that their property was composed of separate parcels is wholly unfounded. Petitioners themselves compiled and introduced the exhibit below listing their property as separate parcels—Exhibit C—which was featured in the trial court decision. *See* Pet. App. 20a. *See also* AP Pet. 3 (Allegheny Pittsburgh "purchased numerous tracts of real estate located in Webster County").

declined to order adjustments in the assessments of 5 parcels owned by petitioners, in part because of "the small size of said parcels." Pet. App. 46a. The court's findings were thus made with any possible distinctions affecting value fully in mind.

Even if the Allegheny Pittsburgh-East Kentucky Energy property is now to be viewed as 19 discrete parcels, the discriminatory effects of the "welcome stranger" approach are apparent. While the County now finds it objectionable to compare the *average* assessment of the Allegheny Pittsburgh-East Kentucky Energy property with the average assessments of the comparables, consideration of *median* assessments yields similar startling disparities.[17]

In 1975 the median Allegheny Pittsburgh parcel in size (parcel 5 on Exhibit C, Pet. App. 20a) was assessed at $35.49 per acre. The median assessment among the 19 parcels (parcels 4 and 14) was $25.00 per acre. In 1975 the median comparable parcel in size (parcel 4 on Exhibit B, Pet. App. 22a) was assessed at $34.99 per acre. The median assessment (parcel 9) was $33.09 per acre. Thus, prior to the Assessor's taking into account the purchase by Allegheny Pittsburgh, the comparables and petitioners' parcels were assessed on similar bases.

After the changes in assessment instituted in 1976 and 1977, the *highest* assessment on any of the comparables (parcel 2) was $53.68 per acre. By contrast, the *lowest* assessment on any of the Allegheny Pittsburgh parcels (parcel 2) was $59.89 per acre, and that assessment was 4 times lower than the next lowest assessment among the remaining 18 parcels (parcel 18, assessed at $247.06 per acre). After the 1976 and 1977 adjustments, the assess-

---

[17] The use of median comparisons eliminates any possible distortion caused by allegedly unique parcels "skewing" a comparison based on averages. *See* I.R. Vesselo, *How to Read Statistics* (1962), at 92.

ments on the comparables ranged from $20.00 per acre to $53.68 per acre. By contrast, the range for the Allegheny Pittsburgh parcels in 1976 was from $59.89 per acre to $4,516.13 per acre. If one excludes the highest and the lowest assessments among the 19 Allegheny Pittsburgh parcels, the range narrows somewhat to a low of $247.06 per acre and a high of $2,669.49 per acre. And even excluding from consideration the 5 smallest parcels that Allegheny Pittsburgh purchased, and parcel 2, which respondent asserts is uniquely valuable, the range of assessments remains from a low of $247.06 per acre to a high of $735.00 per acre.

The *lowest* assessment in that range is more than 4 times higher than the *highest* assessment on the comparables. The highest assessment among the Allegheny Pittsburgh parcels (even after excluding from consideration parcel 2 and all parcels of less than 5 acres in size) was more than 13 times higher than the highest assessment on any of the properties stipulated by the County to be comparable, neighboring, and substantially the same geologically.

After East Kentucky Energy purchased the property, the median parcel in size was assessed at $543.35 per acre. The median assessment (on a 1,335 acre parcel) was $539.04 per acre. By contrast, among the comparables, the median parcel in size was assessed at $60.45 per acre. The median assessment (which was applied to 3 separate parcels) was $60.50 per acre. In other words, even excluding consideration of the allegedly "unique" parcel which the County asserts "skewed" the average, petitioners' parcels were assessed on a median basis approximately 9 times higher than the comparable properties.

To consider parcels of approximately the same size, East Kentucky Energy's 4,287 acre tract was assessed at $3,109.54 per acre in 1984, while a 5,558 acre comparable tract—again, stipulated to be a "neighboring, comparable

propert[y]" that was "substantially the same geologically"—was assessed at $60.50 per acre in 1984. Pet. App. 20a, 22a. The large East Kentucky Energy parcel was thus assessed and taxed at a level *50 times* that of the large comparable tract.[18] To take another example, East Kentucky Energy's 1,335 acre tract was assessed at $539.04 per acre while a 1,300 acre comparable was assessed at $60.50—off by a factor of 9. Pet. App. 20a, 22a. Significantly, coal borings *were* conducted on the 1,300 acre comparable. On the basis of actual tests, the expert Mullenex concluded, comparing the 1,300 acre comparable and petitioners' property, that "the same seams * * * occur basically on both properties." [19]

In any event, it is difficult to grasp the point of the County's new argument. The Assessor testified that she assessed petitioners' property in Webster County at 50 percent of the consideration shown in the deeds. She certainly never purported to assign different values to the constituent parcels because some were more valuable than others, and the different parcels were not sold separately. Indeed, the Assessor distributed the total, single sales price over the constituent parcels in a completely arbitrary fashion. To take account of the sale from Allegheny Pittsburgh to East Kentucky Energy, for example, the Assessor raised the assessment on every parcel except parcel 3 by 10 percent, and then raised parcel 3

---

[18] Quite apart from the stipulation, Mullenex testified that the 5,558 acre comparable was in fact geologically comparable, in that "it has the same coal seams present in the area" as the East Kentucky Energy property and, indeed, "it has a larger distribution of acreage of these seams, of the same seams, that were found to be mineable than the Kentucky Energy property." Resp. Opp. Cert. App. 24a-25a.

[19] Resp. Opp. Cert. App. 10a. One seam was not on the comparable, *id.* at 18a, but "there are a couple of seams that appear on the [comparable] property that is shown as mineable, but from the information that we have from drilling are not mineable on East Kentucky's property." *Id.* at 10a.

by what was left (which turned out to be a 22.4 percent increase)—all in order to make the total come out to exactly 50 percent of the selling price. *See* Pet. App. 20a. This approach clearly was not based on differing values among the parcels, because the Assessor did not undertake any comparisons or appraisals. Pet. App. 29a-30a.

D. The Discrimination Shown on the Record Cannot Be Justified

The County argues at several points that it should prevail because the court below ruled that the Assessor's actions did not constitute "intentional and systematic" discrimination. *See, e.g.*, Resp. Br. i, 4-5. As explained in petitioners' opening brief, at 23-34, this ruling by the majority below was not a factual finding but a legal conclusion, based on (1) an erroneous understanding of what the "intentional and systematic" test requires, and (2) an erroneous belief that petitioners could be relegated to raising the assessments of all others to cure any disparities. Discrimination in taxation is "intentional and systematic" when it results not from mere errors in judgment but rather from an approach "adopted as a practice"—when the challenged actions are taken "pursuant to a deliberately adopted system." *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 99 (1924); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23, 25 (1931). The County does not dispute that the assessments on petitioners' property were raised—and the assessments on other properties were not raised by a comparable amount—pursuant to a policy deliberately adopted by the Assessor. *See* Pet. Br. 30.

The County argues that courts should "not intervene merely on the ground of a mistake in judgment" on the part of the assessor, Resp. Br. 6, and we agree. Pet. Br. 26. But there is no question of exercise of judgment at issue here. The "welcome stranger" approach to assessment substituted for *any* exercise of judgment. By not

comparing the properties or conducting any physical inspections or tests, Pet. App. 29a-30a; EKE Pet. App. 59a, the Assessor abandoned her judgment and instead followed an automatic process—though one not sanctioned by any statute or regulation.

The County also contends that this Court should accord considerable deference to the statutory scheme adopted by the West Virginia Legislature, Resp. Br. 17, 25, and again we agree. Pet. Br. 23-25. Indeed, petitioners have no quarrel with that scheme. The state constitutional and statutory scheme mandates that petitioners' property and other real property in the State be treated the same—that "*all* property * * * be taxed in proportion to its value," that "*all* property subject to ad valorem taxation * * * be assessed at" a uniform percentage of its value, and that "*all* property * * * be assessed * * * at its true and actual value." W. Va. Const. art. X, §§ 1, 1b; W. Va. Code § 11-3-1 (emphasis supplied). It is *the Assessor's* appraisal policy that led to the discrimination in this case, and no amount of deference can justify the staggering disparities caused by that policy.

State law limits the interests the County can adduce in defense of its appraisal policy. Significantly, the County cannot and does not assert many of the interests advanced by its amici in this case, or interests which other courts have relied upon in other cases.[20] Thus, amici National Association of Counties, *et al.*, note that Alabama permits owners of agricultural property to elect a different valuation system, and that the California constitution permits differential valuation to link taxes to purchase price. *See* Nat'l Ass'n Br. 10-11. In West Virginia, however, all property is to be assessed and taxed

---

[20] *See United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (Court declines to consider argument raised by amicus that "was not raised by either of the parties here or below"); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979) (same); *Knetsch* v. *United States*, 364 U.S. 361, 370 (1960) (same).

on the same basis: true and actual value. Petitioners' property *was* assessed and taxed on that basis, but other comparable properties in the County were *not*. Whether or not interests advanced by other States could sustain the disparities shown on this record, Webster County has advanced no interest remotely justifying *its* discriminatory system.

Indeed, Webster County relies most heavily on what is routinely the last refuge of arbitrary decisionmakers in equal protection cases—administrative convenience. *See, e.g.*, Resp. Br. 22, 32. Such considerations may justify marginal disparities in an otherwise valid system, but convenience alone can hardly justify unconstitutional discrimination.[21] Otherwise, a system imposing the entire tax burden on all those whose names begin with "A," or on all those who live in one county, would be constitutional as easier to administer than other systems.

The County's suggestion that equal treatment would require "exotic and expensive evaluation techniques" should not be seriously considered. Resp. Br. 32. We agree completely that "scientific uniformity" is not required, *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 526 (1959), but bland invocation of such litanies is hardly responsive to a record of disparities in assessment increases over 10 years of up to 6,500 percent, and in current assessments of up to 3,500 percent. The County's assertion that the Assessor would have difficulty doing what assessors are supposed to do comes with ill grace when the Assessor deliberately declined to undertake any appraisal activities at all, Pet. App. 29a-30a; EKE Pet. App. 58a-59a, and eschewed "use of any materials, guides, services or assistance available through the State

---

[21] *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency"); *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240 (1926) ("A forbidden tax cannot be enforced in order to facilitate the collection of one properly laid").

Tax Commissioner's Office." Pet. App. 30a; EKE Pet. App. 60a.[22] Indeed, the International Association of Assessing Officers has confirmed that the Assessor's practice in this case was "[p]lainly unacceptable." [23]

The failure of the County to satisfy the constitutional requirement was not due to any inherent difficulty—"Ample opportunity existed between 1976 and 1985 to correct inequality of assessment" established on the record, Pet. App. 39a—but rather was due to the "reluctance of the assessor and a Board of Equalization and Review to increase the real estate assessments, and consequently the real estate taxes, of friends and neighbors * * *." Pet. App. 40a; EKE Pet. App. 72a.

E. The Remedy

The County agrees that if unconstitutional discrimination is shown on this record, "then the remedy fashioned by the state court violates the Fourteenth Amendment." Resp. Br. 37. The court below relegated petitioners to attempting to raise the underassessments of comparable properties, Pet. App. 9a, but this Court has repeatedly held that such a chimerical "remedy" does not satisfy the constitutional command.[24] What *is* required is that the

---

[22] For example, the task of a West Virginia County assessor has been " 'lightened to a great extent' " by preparation of the State Tax Commissioner's Guide, Pet. App. 33a, EKE Pet. App. 65a (quoting *Tug Valley Recovery Center, Inc.* v. *Mingo Cty. Comm.*, 261 S.E.2d 165, 173 (W. Va. 1979)), but the Webster County Assessor, upon receipt of that Guide, "placed [it] in a drawer where it remained unused and abandoned until the day of the hearing" in the Circuit Court. Pet. App. 34a; EKE Pet. App. 66a.

[23] Brief Amicus Curiae of the International Association of Assessing Officers in Support of Petitioners, at 13. *See also* Brief of Amicus Curiae National Association of Realtors in Support of Petitioners.

[24] *See Sioux City Bridge* v. *Dakota County*, 260 U.S. 441, 446 (1923); *Cumberland Coal*, 284 U.S. at 28; *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931); *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623-624 (1946).

taxpayer discriminated against "have his assessment reduced" to the level of comparable properties, "even though this is a departure from the requirement of statute." *Sioux City Bridge*, 260 U.S. at 446.

The County suggests several alternative "remedies" that may or may not cure the discrimination at some point in the future, such as turning taxing responsibilities in the County over to the State Tax Commissioner, ordering a reassessment of all property, or ordering implementation of a statewide reappraisal called for in a 1982 state constitutional amendment (which, six years later, has yet to be implemented). Resp. Br. 38. None of these possible and future remedies will cure the already-accomplished discrimination against petitioners. What petitioners are entitled to *now* is relief from the unconstitutional assessments imposed on them in the past, and "a *mandate* of equal treatment" for the future. *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original).

CONCLUSION

For the foregoing reasons, and those in petitioners' opening brief, the judgment below should be reversed.

Respectfully submitted,

WILLIAM JAMES MURPHY *
ROBERT T. SHAFFER, III
MURPHY & MCDANIEL
118 West Mulberry St.
Baltimore, MD 21201
(301) 685-3810
Counsel for Petitioner in No. 87-1303

ERNEST V. MORTON, JR.
210 Back Fork St.
Webster Springs, WV 26288
(304) 847-5256
Of Counsel for Allegheny Pittsburgh Coal Company

E. BARRETT PRETTYMAN, JR. *
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5685
Counsel for Petitioners in No. 87-1310

WILLIAM D. PELTZ
900 Louisiana St.
P.O. Box 2463
Houston, Texas 77252
(713) 241-2414

DAN O. CALLAGHAN
CALLAGHAN & RUCKMAN
48 East Main St.
Richwood, WV 26261
(304) 846-2561
Of Counsel for East Kentucky Energy Corporation

W. T. WEBER, JR.
208 Main Ave.
Weston, WV 26452
(304) 269-2228
Of Counsel for Oneida Coal Company, Inc. and Shamrock Coal Company, Inc.

* Counsel of Record